No. 08-502

Supreme Court, U.S.
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In The
Supreme Court of the United States

D.G., GUARDIAN AD LITEM FOR J.G., A MINOR,

Petitioner,

v.

NORTH PLAINFIELD BOARD OF EDUCATION, RICHARD GRECO, JANE DELANEY and MARILYN BIRNBAUM,

Respondents.

On Petition For A Writ Of Certiorari To The New Jersey Superior Court Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PROCEDURAL HISTORY AS PERTINENT TO PETITION 1

FACTS ESTABLISHED BY TRIAL TESTIMONY AND NECESSARY TO UNDERSTAND THE ISSUES PRESENTED IN THE PENDING PETITION 5

REASONS FOR DENYING THE PETITION 18

I. Review Should Be Denied As The Petition Was Filed Beyond The Time Provided By Sup. Ct. R. 13(1) 18

II. This Petition Should Be Denied Since Petitioner Has Failed To Join Necessary And Indispensible Parties, The State Of New Jersey And The Superior Court Of New Jersey 20

III. Review Should Be Denied Because Petitioner Cannot Factually And Legally Substantiate His Complaints That He Was Treated Unjustly By The New Jersey Courts 22

A. Judge Kumpf Did Not Err By Severing The Case 22

B. Because Petitioner Voluntarily Sought A Change In Venue, He Should Be Judicially Estopped For Claiming That He Was Denied Access To The Courts In Somerset County Because Of His Disability 25

TABLE OF CONTENTS – Continued

Page

C. The Trial Court's Demeanor And Control Of His Courtroom Was Appropriate And Fair 26

IV. The Law Regarding *Prima Facie* Evidence Of A Violation Of The ADA Is Clear. The Trial Court Correctly Applied That Law Denied Petitioner's Motion *In Limine* To Be Declared A Prevailing Party With Regard To Handicap Access Issues Under The ADA. Review Of This Issue Is Unwarranted And Unnecessary 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Angst v. Royal Maccabees Life Insurance Company, 77 F.3d 701 (3d Cir. 1996).....21

Bechtel v. E. Penn Sch. Dist. of Lehigh County, CIV. A. 93-4898, 1994 WL 3396 (E.D. Pa. Jan. 4, 1994) 29

Block ex rel. Block v. Rockford Pub. Sch. Dist. # 205, 01 C 50133, 2001 WL 1195757 (N.D. Ill. Oct. 10, 2001).....29

Board of Education v. Rowley, 458 U.S. 176 (1982).....23

Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524 (3d Cir. 2007), *amended on reh'g* (Mar. 8, 2007) 29

Brett v. Great American Recreation, 144 N.J. 479 (1996).....26

DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997).....29

Matthews v. Jefferson, 29 F. Supp. 2d 525 (W.D. Ark. 1998).....31

McCurrie v. Town of Kearny, 174 N.J. 523 (2002).....25

Montrose Medical Group Participating Savings Plan v. Bulger, 243 F.3d 773 (3d Cir. 2001) 25, 26

New Jersey DFYS v. J.Y., 352 N.J. Super. 245 (Sup. Ct. App. Div. 2002).....26

TABLE OF AUTHORITIES – Continued

Page

Parker v. Universidad De Puerto Rico, 225 F.3d 1 (1st Cir. 2000) 31

Pittsburgh Towing Company v. Mississippi Valley Barge Line Company, 385 U.S. 32 (1966) 18, 19

Polera v. Bd. of Educ. Of the Newburgh Enlarged City School District, 288 F.3d 478 (2d Cir. 2002) 24

Ramer v. NJ Transit Bus Operations, 335 N.J. Super. 304 (Sup. Ct. App. Div. 2000) 25

S.H. v. State-Operated School District of the City of Newark, 336 F.3d 260 (D.N.J. 2003) 23

Schonfeld v. City of Arlsbab, 978 F. Supp. 1329 (S.D. Cal. 1997) 31

State v. Davenport, 177 N.J. 288 (2003) 27

Swenson v. Lincoln Respondents No. 2, 260 F. Supp. 2d 1136 (D. Wyo. 2003) 29

Vallejo By Morales v. Rahway Police Dept., 292 N.J. Super. 333 (Sup. Ct. App. Div. 1996) 26

Vargas v. Camilo, 354 N.J. Super. 420 (Sup. Ct. App. Div. 2002), *certif. den.* 175 N.J. 543 (2003) 25

STATUTES

20 U.S.C. § 1415(b)(6) 24

20 U.S.C. § 1415(f) 24

42 U.S.C. § 1400 ..... 2, 3

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12101-12213 20

42 U.S.C. § 12131 29

42 U.S.C. § 12131(1) 29

42 U.S.C. § 12132 29

RULES

Fed. R. Civ. P. 19 .....20, 21

Fed. R. Civ. P. 19(b) 21

Sup. Ct. R. 13(1) 18

REGULATIONS

28 C.F.R. § 35.150 30

28 C.F.R. § 35.150(b)(1) 30

28 C.F.R. § 35.151 30

28 C.F.R. § 35.151(a) 31

28 C.F.R. § 35.151(b) 31

28 C.F.R. § 35.151(c) 32

28 C.F.R. Part 35 32

28 C.F.R. Part 36 32

28 C.F.R. Part 36, App. A 32

41 C.F.R. § 10 32

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

4 Moore's Federal Practice, § 19.03(2)(b)(ii) 21

21 A.L.R. Fed. 12 (1974) 21

NTS Am. Jur. 2d, *Americans with Disabilities Act: Analysis and Implications* § 284 30

PROCEDURAL HISTORY AS PERTINENT TO PETITION

On or about June 15, 2000, Petitioner's mother filed a due process petition with the New Jersey Department of Education, Office of Special Education Programs on behalf of Petitioner against the North Plainfield Board of Education and several individual defendants (hereinafter "Respondents") alleging, *inter alia*, that the Respondents violated Petitioner's Individualized Education Plan ("IEP") during the 1999-2000 school year. Although the Respondents attempted to convene several IEP meetings with Petitioner and his mother to address these issues, their efforts were fruitless.

The matter was assigned to the Honorable Kathryn A. Clark, A.L.J.[1]

On or about April 24, 2001, the parties appeared before Judge Clark to address prehearing motions, discovery and witnesses. At that time, counsel for Petitioner objected to Petitioner's guidance counselor testifying at the due process hearing, and to two of Respondents' representatives being present in the courtroom during the due process hearing. Judge Clark denied both applications.

On May 24, 2001, the parties appeared before Judge Clark to present opening arguments in the due

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[1] Hon. Kathryn A. Clark, A.L.J., was a New Jersey Administrative Law Judge.

process hearing. At that time, counsel for Petitioner moved for reconsideration of Judge Clark's denial of his objections. Judge Clark denied Petitioner's motion for reconsideration.

On or about June 6, 2001, the parties were scheduled to appear before Judge Clark to commence the due process hearings. Petitioner failed to appear. Alternatively, Petitioner sought *ex parte* review of Judge Clark's ruling and a stay pending appeal on an emergent basis from the Appellate Division of the Superior Court. The Appellate Division refused to hear the matter, because it did not possess initial appellate jurisdiction over actions arising pursuant to the Individuals with Disabilities Education Act ("IDEA"), 42 U.S.C. § 1400. Appellate jurisdiction rested with the United States District Court. Because of Petitioner's failure to appear before Judge Clark as scheduled, the due process hearing did not proceed.

On June 7, 2001, Judge Clark issued a written ruling reflecting, *inter alia*, the denial of Petitioner's motions. On June 7, 2001, Petitioner sought *ex parte* review of Judge Clark's ruling and a stay pending appeal before the Honorable Helen E. Hoens, P.J.Cv.[2] (at that time). Justice Hoens stayed the Administrative Law matter pending appeal.

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[2] At the time of the Plaintiff's *ex parte* application, the Honorable Helen E. Hoens was the Presiding Judge of the Civil Part of the Superior Court of New Jersey in Somerset County. The Honorable Helen E. Hoens is presently a Justice of the New Jersey Supreme Court.

On or about June 8, 2001, the parties appeared before Justice Hoens to discuss case management of the appeal. On or about June 22, 2001, the parties also participated in a telephone conference with Justice Hoens regarding the status of the appeal and a briefing schedule.

On or about July 3, 2001, Petitioner filed a Complaint in the Superior Court of New Jersey alleging that the Respondents discriminated against him on the basis of his disability in violation of the New Jersey Law Against Discrimination, the Americans with Disabilities Act, federal equal protection laws and Petitioner's rights under the Individuals with Disabilities Education Act ("IDEA"), 42 U.S.C. § 1400. That matter was initially assigned to the Honorable Frank W. Gasiorowski, J.S.C.[3] As such, the parties agreed to consolidate the administrative and Superior Court matters for purposes of mediation only. Then the parties attempted to mediate the matters to no avail.

The matter was subsequently re-assigned from Judge Gasiorowski to the Honorable Fred H. Kumpf, J.S.C. Thereafter, on or about August 1, 2005, the Judge Kumpf, J.S.C., remanded Petitioner's due process petition to the Office of Administrative Law because, pursuant to the IDEA, Petitioner is required

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[3] J.S.C. is an abbreviation for Judge of the Superior Court of New Jersey.

to exhaust administrative remedies prior to judicial review.

Shortly before trial, Petitioner moved to change venue from Somerset County to Hunterdon County[4] so that Petitioner could testify while sitting in his wheelchair in the witness box. Somerset County was apparently unable to remove a step into the witness box or construct a ramp for Petitioner's wheelchair to use to get into the witness box. Although Judge Kumpf had suggested that Petitioner testify from sitting in his wheelchair directly in front of the witness box as had occurred in other matters with witnesses confined to a wheelchair, Petitioner objected; Petitioner argued that by testifying in front of the witness box the jury would perceive Petitioner as "different." Since Hunterdon County was able to rearrange the witness box in courtroom so that Petitioner could maneuver his wheelchair into the witness box, Petitioner voluntarily sought a change of venue. Petitioner's motion was granted.

From November 1, 2005 through December 16, 2005 an 18-day jury trial was conducted before the Honorable Peter A. Buchsbaum, J.S.C.[5] On or about December 19, 2005, the jury entered a verdict in favor

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[4] Hunterdon County is contiguous to Somerset County. The two Courthouses are located approximately 15 miles from each other.

[5] Petitioner incorrectly stated that Judge Kumpf, presided over the trial of this matter.

of the Respondents and against Petitioner on all counts of the Complaint. On or about December 21, 2005, Judge Buchsbaum entered an Order of Judgment with prejudice and memorializing the jury verdict. Thereafter, on or about March 17, 2006, Judge Buchsbaum denied Petitioner's motion for a new trial and/or to set aside the verdict.

Petitioner subsequently appealed the trial court verdict. The Appellate Division of the Superior Court of New Jersey affirmed the trial court verdict. On July 11, 2008, the Chief Justice of the New Jersey Supreme Court entered an Order denying Petitioner's Petition for Certification to that Court.

FACTS ESTABLISHED BY TRIAL TESTIMONY AND NECESSARY TO UNDERSTAND THE ISSUES PRESENTED IN THE PENDING PETITION[6]

Amongst the many allegations made during the trial, Petitioner complained that Ricardo Beckford, an aide assigned to assist him, was not trained by the Respondents as per agreement between the parties. As a result of this, Petitioner complained that he was often left in urine and feces in class and chemicals were poured over him when he vomited. In fact, Mr.

[6] Facts set forth herein were discerned strictly from trial testimony. Citations to trial transcript can be submitted to substantiate each fact depicted.

Beckford was an experienced aide. He had worked for five years as an instructional aide for the Respondents. Mr. Beckford also had experience working with children with cerebral palsy. Although Mr. Beckford had discussions with Richard Greco[7] about additional training to work as Petitioner's aide, Mr. Beckford was unable to accomplish that training during the summer months. Nonetheless, Mr. Greco advised Erika Nagy, Petitioner's conductive educator, that the Respondents would pay her for training Mr. Beckford at the commencement of the school year. Ms. Nagy was advised to take as much time as was necessary to train Mr. Beckford. Except for the testimony of Petitioner, there was no other testimony substantiating the fact that Petitioner was "left in urine and feces in class." His teachers never saw puddles of urine under his chair. Although Mr. Beckford acknowledged that on occasion Petitioner did wet himself, Mr. Beckford explained when and how it would occur. Mr. Beckford denied ever allowing Petitioner to wet himself such that puddles formed under his chair. Although Ms. Nagy claimed to have found Petitioner wet, she acknowledged that she never complained to the case manager about that condition. Ms. Nagy acknowledged that Mr. Beckford walked Petitioner between classes.

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[7] Richard Greco was the Director of Pupil Services for the North Plainfield School District.

Petitioner claimed that he was not receiving the materials he needed, that he was not receiving adaptive physical education, that he was not provided with "make-up time" for his conductive educator, that he was not allowed to use his power wheelchair in the school, and that he was not allowed to be in the hallway with his friends. He also claimed that he was abused by the aides. Except for the statement of an at-home tutor assigned to assist the Petitioner in the fifth and sixth grades that she "seemed to get a lot of resistance," there was no testimony substantiating any of Petitioner's remaining allegations. In the sixth grade Petitioner had a regular classroom teacher, a special education teacher assigned to work only with him during the school day, an aide, a conductive educator and an at-home tutor assigned by the Respondents to assist him with his education.

The Respondents set up a computer for the Petitioner with a special computer keyboard in the library at the elementary school when he was in preschool. When Petitioner entered the third grade, a computer was set up in his classroom with a special intellikeys keyboard for his use. During the fourth grade, Petitioner was evaluated by the Center for Enabling Technology for specific computer equipment and programs. As a result thereof, the Respondents purchased a laptop computer for Petitioner during his fifth grade school year pursuant to the recommendations made by the Center for Enabling Technology. As Petitioner entered the sixth grade, additional software was installed onto his laptop computer. Petitioner's

sixth grade in-class, special education support teacher was also trained to assist him in the use of his computer. In the seventh grade, a second laptop computer was purchased by the Respondents for Petitioner. In addition to being provided with in-school computer classes, Petitioner was also provided with private computer lessons, during regular school hours, through the Bergen County Special Services School District. The cost of those private computer lessons was paid for by the Respondents. In the ninth grade, the Respondents purchased a third laptop computer for the Petitioner. Computer technicians employed by the Respondents were routinely available to install new software onto Petitioner's computer as needed, and to repair and reboot the computer when it crashed. The computers provided to Petitioner were regularly upgraded with new equipment, as it became available. It should be noted that Petitioner is the only North Plainfield student who has been provided with a laptop computer by the Respondents. The Respondents also arranged and paid for Petitioner to attend a summer computer camp.

Petitioner was not able to use his power wheelchair when he attended sixth grade in Somerset School. The chair was too large to fit on the chair lift that had previously been installed in that school building. Nonetheless, Petitioner's mother had no objection to the Respondents purchasing an appropriate manual wheelchair for his use within that school.

Contrary to the allegations of the Petitioner, there was absolutely no evidence that the Principal or Respondents did not want Petitioner using his wheelchair in the hallways in the Somerset School. To the contrary, Judy Grady, the Principal of the Somerset School, testified that in her 42 years of education, she has never barred any child from her school.

Petitioner alleged that charges of abuse were made against his aides. No such charges were ever filed with the Respondents. Petitioner did claim that Mr. Beckford abused him by using a product named "Upchuk" in an attempt to clean vomit off of him and his wheelchair. That incident occurred during the fall of Petitioner's fifth grade school year. Petitioner testified that Upchuk was poured over him by Mr. Beckford. Seven months later in June 2000, a complaint was filed with the New Jersey Division of Youth and Family Services (hereinafter "DYFS") regarding the use of Upchuk, amongst other things. James Gregory was an investigator with the Institutional Abuse Investigation Unit of DYFS. He investigated the complaint filed on behalf of Petitioner and issued a report finding that Mr. Beckford's actions were justified and appropriate and that any allegations of abuse were unfounded.

Books on tape, together with a special tape player, were ordered for Petitioner and paid for by the Respondents. Petitioner received adaptive physical education at his mother's request. In addition to adaptive physical education, Petitioner utilized the services of a conductive educator, Erika Nagy; the

Respondents paid for that service. The Respondents also paid for Petitioner to attend a summer camp program run by Erika Nagy and for transportation to and from that camp. The Respondents further paid for Erika Nagy to provide "make up" services for those services missed during the school year. In addition, the Respondents provided for Petitioner to have adaptive physical education and physical therapy with third party agencies at its cost and expense.

The Respondents acknowledged that the physical structure of Somerset School was not fully, handicap accessible. It was an old building that had not been fully renovated. It had a lift and the girl's bathroom was made handicap accessible. Notwithstanding its physical shortcomings, the services provided were fully accessible to handicap and disabled students such as Petitioner. There were no complaints made by Petitioner or by his mother that he did not have appropriate access to the school to take full advantage of the education services being offered.

Petitioner attended the North Plainfield Middle/ High School since entering the seventh grade. In the Spring prior to Petitioner's entering the seventh grade, Petitioner's mother toured the middle school building with Robert Abbate, the Vice Principal of the North Plainfield Middle School. Petitioner's mother testified at trial that as a result of the tour, she determined the handicap stall in the boys' bathroom was too small for Petitioner's wheelchair, and she asked that it be enlarged. Mr. Abbate, however, contradicted the testimony of Petitioner's mother.

According to Mr. Abbate, it was agreed that the first floor bathroom was adequately sized for Petitioner's needs; the second floor bathroom was inadequately sized. As a result, all of Petitioner's classes during the seventh and eighth grade were held on the first floor of the middle school building. Moreover, Petitioner's mother executed an IEP concerning the Petitioner and his advancement into the seventh grade on May 22, 2001. Under the provisions of the document pertaining to the parent's concerns, there was no mention of "bathroom accessibility issues." Similarly, there was no mention of "bathroom accessibility issues" raised in the IEP concerning Petitioner and his advancement into the eighth grade. At no time during Petitioner's seventh or eighth grade school years did anyone complain to either Mr. Abbate, Vice Principal of the Middle School, or to Rita Linder-Lavery, the case manager assigned by the Respondents to work with Petitioner, about inaccessible bathrooms.

Petitioner and his mother also toured the North Plainfield High School before he began the ninth grade. The tour was conducted with Rita Linder-Lavery. Petitioner's class schedule was prepared in anticipation of that tour and given to Petitioner's mother. Following that tour, the following state ment was placed on a copy of Petitioner's class schedule, "Schedule and classrooms approved, the cafeteria, bathroom facilities, acceptable, accommodations will have to be made on the lift used for access to computer room." Petitioner's mother and

Ms. Linder-Lavery initialed that statement. Thereafter, Petitioner's mother never raised any issues to Ms. Linder-Lavery concerning bathroom inaccessibility. The IEP prepared in anticipation of Petitioner entering tenth grade did not include any parental comments about inaccessible bathrooms.

Edmund H. Gaunt, Jr., an architect, testified as an expert witness on behalf of Petitioner with respect to whether the North Plainfield High School physical plant met the Americans with Disability Act construction standards. As a result of his physical inspection of the High School building Mr. Gaunt concluded that the boys' bathroom off of the cafeteria had minor noncompliance issues. The press down faucet did not allow water to flow for 10 seconds before shutting off. The paper towel dispenser was six inches too high. The sink was two inches too high. The toilet paper dispenser was five inches too high. The urinal was one inch too high.

Mr. Gaunt also inspected three other boys' bathrooms in the High School. With respect to an upper level bathroom, he determined that the urinals were not spaced properly for wheelchair access, that the toilet seat was two inches too low, and that the mirror was fourteen inches too high. With respect to the boys' bathroom at the top of the first set of stairs, Mr. Gaunt determined that the floor mounted urinals were not sanitary, that the faucet was not operating, that the toilet paper dispenser was five inches too high, that the toilet seat was one and one-half inch too low, and that the toilet door was improperly

placed in front of the toilet. And with respect to the boys' bathroom in building B, Mr. Gaunt determined that the toilet paper dispenser was seventeen inches too high, that the toilet seat was one and one-half inch too low, that the paper towel dispenser was twelve inches too high, that the sink was one inch too low and that the handicapped sink failed to have insulation underneath it.

Mr. Gaunt inspected the two lifts that were routinely used by Petitioner. In so doing, Mr. Gaunt determined that the base on the inclined lift was only thirty inches wide; the ADA construction standards required a thirty-six inch base. He also found that it was key activated; the ADA construction standards required a system that could be used by anyone at any time, such as a button system. Mr. Gaunt determined that the vertical lift was ADA compliant except for the fact that it was key activated.

Mr. Gaunt also inspected other access ways around the High School. As a result, he determined that classroom doors were recessed and had no latch side clearance. He also found that the doorknobs were not ADA compliant.

Notwithstanding those findings, Mr. Gaunt acknowledged that when dealing with a public building, Title Two of the ADA specifically provides that not every aspect of the public building must be accessible or compliant with ADA construction requirements, provided that individuals with disabilities have access to the services provided within the public

building. He also acknowledged that when a public school is renovated, construction plans must be approved by the New Jersey Department of Community Affairs or a local building inspector. In such case, the plans are reviewed for compliance with the Barrier Free Access Code and not the ADA.

Mr. Gaunt also agreed that if construction plans are approved, construction is completed and if construction is approved by the local construction official, a school board has a reasonable basis for believing that the construction was done in compliance with the Barrier Free Access Code.

Mr. Gaunt acknowledged that the boys' bathroom off of the cafeteria had only minor infractions, and that his deceased partner, who had done the initial inspection and expert's report for the Petitioner regarding the High School building, said that the bathroom was ADA compliant. Mr. Gaunt also said that he did nothing to determine if the minor infractions in that boys' bathroom interfered with or restricted Petitioner's use of that bathroom.

Although the inclined lift platform was slightly smaller than ADA requirements, Mr. Gaunt understood that Petitioner regularly used the inclined lift. He also understood that Petitioner used the vertical lift. He acknowledged that Petitioner or his aide had a key to operate both lifts. Mr. Gaunt further acknowledged that his deceased partner did not think it was realistic to place a lift into a school that anyone could use by pressing a button. Finally, Mr. Gaunt

acknowledged that he did not know whether the deviations from ADA construction standards that he discussed interfered with or prevented Petitioner from having full access to the school services offered at North Plainfield High School.

At the time of the trial, Petitioner was in the eleventh grade and in all honors classes – U.S. History, Precalculus Honors, English II Honors, Advanced Biology Seven Honors, Web Page Design and Spanish Four Honors.

North Plainfield Middle/High School had undergone certain renovations several years prior to trial. The construction plans for the renovations were prepared by licensed architects. The construction plans were prepared so that all renovations were done in compliance with the New Jersey Barrier Free Access Code. Said plans were reviewed and approved by the North Plainfield Construction Official. Construction of the renovations at the Middle/High School was done in accordance with the construction plans. A certificate of occupancy was issued by the North Plainfield Construction Official following the completion of construction. The renovations to the North Plainfield Middle/High School were completed in accordance with the New Jersey Barrier Free Access Code.

Petitioner claimed that the lifts that he used in the Somerset School and the Middle/High School were continually out of order. Trial testimony demonstrated, however, that the lifts used by the Petitioner

were infrequently inoperable or that they became inoperable because of user error. The Respondents' custodial staff was not responsible for repairing the lifts. Rather, the Respondents contracted for these services with Handi Lift, an elevator contractor. That elevator contractor was contacted immediately when a lift became inoperable. Generally, Handi Lift responded within one day for a service call.

Handi Lift maintained service records for all repairs made to all of the lifts it serviced for the Respondents, including the lifts at the Somerset School and the Middle/High School. Those records were introduced into evidence at trial and indicated that Handi Lift made service calls to the Somerset School on September 19, 2000 (the day after Petitioner first attended Somerset School). During the next three weeks, there were several problems that arose and were appropriately addressed. Repairs to the lift were completed on October 10, 2000. No further repairs were made to the lift at Somerset School during the 2000-2001 school year – the only year that the Petitioner attended the Somerset School.

The records maintained by Handi Lift indicated that the vertical lift was repaired in August 2003 (the summer before the Petitioner entered the ninth grade and before he began using the vertical lift). Thereafter, Handi Lift was not called to service that vertical lift until April 28, 2004. At that time, the mechanic servicing the lift recommended a new lift. The parts needed to repair the vertical lift were no longer available. Notwithstanding the need to be replaced,

the vertical lift continued to operate until June 16, 2004. The Respondents contracted with Handi Lift for the installation of a new lift on July 30, 2004. Installation was fully completed and a certificate of occupancy was issued for the new vertical lift on October 20, 2004. During the balance of the 2004-2005 school year, Handi Lift serviced the vertical lift on December 14, 2004 (upper gate was pulling from the wall); January 6, 2005 (lower door was out of adjustment – caused by pulling, pushing or running into the door); February 11, 2005 (lower door was out of adjustment); March 11, 2005 (lower door was out of adjustment); March 24, 2005 (adjust the gate switch on the upper gate); April 14, 2005 (lower door was out of adjustment); and September 19, 2005 (lower door was out of adjustment).

The records maintained by Handi Lift indicated that the inclined lift was repaired on January 16, 2004 (wiring was pulled out of the upper call box of the lift), on May 27, 2004 (repaired a broken upper limit arm) and on September 17, 2004 (replaced the driver box key that was vandalized).

Although there were short periods of time when either the inclined lift or the vertical lift was not operating, it is clear that the lifts were not routinely out of service. Moreover, the Respondents acted promptly and appropriately to repair and replace the lifts as necessary. Finally, it should also be noted that the majority of the repairs were necessitated by

someone hitting or running into the door of the vertical lift and causing it to become out of line.

REASONS FOR DENYING THE PETITION

I.

REVIEW SHOULD BE DENIED AS THE PETITION WAS FILED BEYOND THE TIME PROVIDED BY SUP. CT. R. 13(1)

The Petition for Certification filed with the New Jersey Supreme Court was denied by Order of the Honorable Stuart Rabner, Chief Justice, dated July 11, 2008. That Order was filed by the Clerk of that Court on July 15, 2008. The Petition for a Writ of Certiorari was with the Clerk of the United States Supreme Court on October 14, 2008.

Sup. Ct. R. 13(1) provides:

> A petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

In *Pittsburgh Towing Company v. Mississippi Valley Barge Line Company*, 385 U.S. 32 (1966), this Court addressed the fate of an appeal that was untimely docketed. The Petitioner argued that the late docketing was the result of a miscommunication

between counsel. *Id.* This Court dismissed the appeal and, in doing so, announced:

> [I]f there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence.

Id. at 32-33.

Ninety (90) days from July 11, 2008, the date of the entry of the Order by the Chief Justice of the New Jersey Supreme Court, was October 9, 2008. The filing of this Petition on October 14, 2008 was clearly untimely. Even if the ninety (90) day time period were to run from the filing rather than the entry of the Order of the New Jersey Supreme Court, the time period for filing the Petition with this Court would have expired on October 13, 2008.

Since the Petition in this matter was untimely filed, the Petition should be denied. *Pittsburg Towing Company v. Mississippi Valley Barge Line Company*, *supra*.

II.

THIS PETITION SHOULD BE DENIED SINCE PETITIONER HAS FAILED TO JOIN NECESSARY AND INDISPENSABLE PARTIES, THE STATE OF NEW JERSEY AND THE SUPERIOR COURT OF NEW JERSEY

Point II of the Petition filed on behalf of Petitioner seeks to settle issues concerning the application of Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213, to the Courts comprising the Superior Court of New Jersey. More particularly Petitioner petitions this Court to accept this matter and to render an opinion concerning the obligations of Superior Court of New Jersey to individuals suffering from disabilities.

Point III of the Petition filed on behalf of Petitioner seeks to settle issues concerning the treatment afforded Petitioner by the trial judge, a judge of the Superior Court of New Jersey. In that regard, Petitioner asks this Court to issue directives regarding the manner in which a judge of the Superior Court of New Jersey is to handle a trial regarding an individual with a disability.

Fed. R. Civ. P. 19 provides:

> (a) **Persons Required to Be Joined if Feasible.**
>
> (1) ***Required Party.*** A person who is subject to Service of process and whose joinder will not deprive the

> court of subject matter jurisdiction must be joined as a party if:
>
> (A) in that person's absence, the court cannot accord complete relief among existing parties . . .

Fed. R. Civ. P. 19 requires the joinder of a party if the nonjoinder of that party will preclude the court from effecting the relief sought between the extant parties. It requires joinder of a party if the nonjoinder will preclude the court from rendering complete justice among the parties already joined in the action. *Angst v. Royal Maccabees Life Insurance Company*, 77 F.3d 701 (3d Cir. 1996); 4 Moore's Federal Practice, § 19.03(2)(b)(ii); *"Validity, construction, and application of Rule, Rule 19(b) of Federal Rules of Civil Procedure, as amended in 1966, providing for determination to be made by court to proceed with or dismiss action when joinder of person needed for just adjudication is not feasible,"* 21 A.L.R. Fed. 12 (1974).

In the present matter, Petitioner is asking this Court to render a decision affecting the manner in which the Superior Court of New Jersey furnishes its courthouses and/or makes its Court facilities accessible to individuals with disabilities. Unfortunately, neither the State of New Jersey nor the Superior Court of New Jersey are parties to this action. As such, this Court is precluded from rendering "complete justice." Since neither the State of New Jersey nor the Superior Court of New Jersey is a party to this action, no decision rendered by this Court will have any effect upon the Courts about which Petitioner

complains. Since the failure of Petitioner to join the State of New Jersey or the Superior Court of New Jersey will bar this Court from rendering "complete justice", this Petition filed on behalf of Petitioner should be denied.

III.

REVIEW SHOULD BE DENIED BECAUSE PETITIONER CANNOT FACTUALLY AND LEGALLY SUBSTANTIATE HIS COMPLAINTS THAT HE WAS TREATED UNJUSTLY BY THE NEW JERSEY COURTS

Petitioner has raised a myriad of issues regarding alleged errors committed by the trial court and claims that such errors justify a new trial. As stated in more detail hereinafter, however, there is no factual or legal justification for any of Petitioner's arguments. Moreover, there were no objections made by Petitioner's counsel to most of the alleged errors, and the alleged errors do not, either individually or on the whole, constitute "plain error."

A. JUDGE KUMPF DID NOT ERR BY SEVERING THE CASE

On or about August 1, 2005, Judge Kumpf remanded Petitioner's due process petition to the Office of Administrative Law because, pursuant to the IDEA, Petitioner was required to exhaust administrative remedies prior to judicial review. Petitioner's allegation that Judge Kumpf *sua sponte* severed the

Office of Administrative Law and Superior Court matters is simply incorrect. The Respondents had moved for partial summary judgment seeking dismissal of Petitioner's case for failure to exhaust his administrative remedies. Specifically, the Respondents argued that the IDEA required an adjudication of the issues at the administrative level and that the Court's standard of review of those issues was dependent upon an administrative record. The Court was required to give the administrative findings "due weight." *Board of Education v. Rowley*, 458 U.S. 176, 205-206 (1982). Respondents argued that a court is advised not to substitute its own notions of educational policy for those of the local school authorities. *S.H. v. State-Operated School District of the City of Newark*, 336 F.3d 260, 270 (D.N.J. 2003). When a due process petition was filed on behalf of Petitioner alleging that the Respondents did not provide him with a free, appropriate public education, Petitioner was required to pursue this administrative process to its conclusion.

Although Judge Kumpf denied the Respondents' motion to dismiss, he concurred with the Respondents' legal arguments regarding exhaustion and remanded Petitioner's due process petition to the Office of Administrative Law. Pursuant to the IDEA, Petitioner was required to exhaust all administrative remedies prior to judicial review. Judge Kumpf remanded the matter to the Office of Administrative Law to reach a final determination on the merits concerning all of the IDEA issues.

Moreover, consolidation of the administrative matter with the Superior Court litigation would *not* have been proper under the circumstances of this matter, as Petitioner was required to exhaust his administrative remedies. § 1415(f) of the IDEA provides that before bringing claims under other statutes that "seek relief that is also available under this subchapter," the administrative procedures set forth in § 1415 "shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(f). This exhaustion requirement was intended to "channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances." *Polera v. Bd. of Educ. Of the Newburgh Enlarged City School District,* 288 F.3d 478 (2d Cir. 2002). The scope of the IDEA due process proceeding encompasses all "complaints with respect to any matter relating to the identification, evaluation or educational placement of a child, or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(6).

B. BECAUSE PETITIONER VOLUNTARILY SOUGHT A CHANGE IN VENUE, HE SHOULD BE JUDICIALLY ESTOPPED FOR CLAIMING THAT HE WAS DENIED ACCESS TO THE COURTS IN SOMERSET COUNTY BECAUSE OF HIS DISABILITY

Petitioner argues that the Superior Court of New Jersey erred by refusing to make reasonable accommodations for him, thereby forcing him to file a motion to change venue from Somerset County to Hunterdon County. This Court must understand, however, that Petitioner voluntarily moved for a change of venue. On October 13, 2005, Judge Kumpf entered an order granting Petitioner's request for relief. Subsequently, Petitioner failed to object to the trial of this matter proceeding in Hunterdon County. Accordingly, Petitioner, who accepted the benefit of the trial court's ruling, should now be judicially estopped from attacking this ruling on appeal.

Judicial estoppel is the preclusion of a party from taking a litigation position inconsistent with a position purposely taken in the same or previous litigation on which that party prevailed. *See generally*: *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773 (3d Cir. 2001); *McCurrie v. Town of Kearny*, 174 N.J. 523, 533-34 (2002); *Vargas v. Camilo*, 354 N.J. Super. 420, 429-30 (Sup. Ct. App. Div. 2002), *certif. den.*, 175 N.J. 543 (2003). In order for the doctrine to apply, it is necessary that the prior contrary position need not only have been asserted but also decided in the prior proceeding. *See*: *Ramer*

v. NJ Transit Bus Operations, 335 N.J. Super. 304 (Sup. Ct. App. Div. 2000). This Court should not review a claim of error if the party asserting error on appeal "urged the court to adopt the proposition now alleged to be error." *Montrose Medical Group Participating Savings Plan, supra. Brett v. Great American Recreation,* 144 N.J. 479 (1996). *See also*: *Vallejo By Morales v. Rahway Police Dept.,* 292 N.J. Super. 333, 340-41 (Sup. Ct. App. Div. 1996), *certif. den.*, 147 N.J. 262 (1996).

As stated, Petitioner requested a change in venue; he obtained a Court Order transferring venue to the County of his choice; he then conducted a trial in Hunterdon County without objection to the location. As such, Petitioner should now be judicially estopped from attacking the Superior Court's decision to grant that request. Petitioner's acceptance of the benefit of that ruling is inconsistent with a claim that the ruling was erroneous.

C. THE TRIAL COURT'S DEMEANOR AND CONTROL OF HIS COURTROOM WAS APPROPRIATE AND FAIR

The trial court in New Jersey is given broad discretion to exercise reasonable control over the courtroom and the manner and method of presenting evidence to ascertain the truth. *New Jersey DFYS v. J.Y.*, 352 N.J. Super. 245 (Sup. Ct. App. Div. 2002). That control extends to the parties' location and

movement within the courtroom. *State v. Davenport*, 177 N.J. 288 (2003).

Although Petitioner makes scurrilous allegations about the conduct of the trial judge, Petitioner failed to point to any portion of the trial transcript in either the briefs submitted to the Appellate Division of the Superior Court of New Jersey or to the New Jersey Supreme Court that depicted inappropriate judicial conduct. Petitioner has also failed to cite any legal authority to support his bald allegations. A review of the trial transcript, however, will clearly illustrate how the trial judge carefully and with great concern for Petitioner addressed issues regarding the Petitioner's courtroom decorum. It should also be noted that Petitioner's counsel never objected to the trial judge's statements or directions concerning Petitioner's courtroom demeanor. In short, the trial judge made every effort to treat the parties in an equal and courteous manner. There simply was no prejudice to Petitioner.

Similarly, Petitioner makes allegations that he was treated unfairly by the attorney representing the Respondents. Again, however, Petitioner is estopped from pointing to any portion of the trial transcript that depicts such unfair conduct. And once again, it must be noted that Petitioner's counsel failed to object even one time to the allegedly outrageous and unfair conduct of the attorney representing the Respondents, one of whom was Francine Gargano, the attorney for Petitioner on this Petition.

The arguments that Petitioner was treated unfairly are factually baseless. This Court should therefore determine that such allegations do not support granting Petitioner's Petition for Writ of Certiorari.

IV.

THE LAW REGARDING *PRIMA FACIE* EVIDENCE OF A VIOLATION OF THE ADA IS CLEAR. THE TRIAL COURT CORRECTLY APPLIED THAT LAW DENIED PETITIONER'S MOTION *IN LIMINE* TO BE DECLARED A PREVAILING PARTY WITH REGARD TO HANDICAP ACCESS ISSUES UNDER THE ADA. REVIEW OF THIS ISSUE IS UNWARRANTED AND UNNECESSARY

Petitioner claims that he established a *prima facie* case of a violation of the ADA and that the trial court erred in denying the Motion *in Limine* made on his behalf and to declare him a prevailing party. In so doing, Petitioner mistakenly argued that the Respondents violated Title II of the Americans with Disabilities Act because at times he did not have access to handicap accessible bathrooms and the lifts in its buildings.

Title II of the ADA prohibits discrimination in public services and provides in relevant part that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

> benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity. 42 U.S.C. § 12131.

The keystone provision of Title II sets forth that: " . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. The term "public entity" is defined by the ADA to mean "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1). The very nature of a public school district as a special purpose district or instrumentality of local government,[8] necessarily means that a public school is a "quintessential 'public entity'" within the meaning of Title II of the ADA. *Block ex rel. Block v. Rockford Pub. Sch. Dist. # 205*, 01 C 50133, 2001 WL 1195757 (N.D. Ill. Oct. 10, 2001), *citing DeBord v. Bd. of Educ. of Ferguson-Florissant Sch. Dist.*, 126 F.3d 1102, 1106 (8th Cir. 1997), *cert. denied*, 523 U.S. 1073 (1998); *Bechtel v. E. Penn Sch. Dist. of Lehigh County*, CIV. A. 93-4898, 1994 WL 3396 (E.D. Pa. Jan. 4, 1994); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007), *amended on reh'g* (Mar. 8, 2007).

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[8] *Swenson v. Lincoln Respondents No. 2*, 260 F. Supp. 2d 1136 (D. Wyo. 2003).

A Title II "public entity" must operate each service, program, or activity so that the service, program, or activity, when *viewed in its entirety*, is readily accessible to and usable by individuals with disabilities. However, a public entity is not necessarily required to make each of its existing facilities accessible to and usable by individuals with disability. NTS Am. Jur. 2d, *Americans with Disabilities Act: Analysis and Implications* § 284. A public entity may comply with the requirements of the ADA as to its existing structures by such means as "redesign of equipment, reassignment of services to accessible buildings, [and] delivery of services at alternate accessible sites" among others. 28 C.F.R. § 35.150. In choosing among available methods for meeting the accessibility requirements, a public entity will give priority to those methods that offer services, programs, and activities "in the most integrated setting appropriate." 28 C.F.R. § 35.150(b)(1). Should a public entity choose to achieve compliance through alteration of an existing facility or construction of a new facility, the work should meet the accessibility requirements of 28 C.F.R. § 35.151. In any event, a public entity is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or an undue financial and administrative burden. 28 C.F.R. § 35.150.

Unlike Title III, which requires removal of architectural barriers whenever to do so would be "readily achievable," a public entity is not required to make

structural changes in existing facilities where other methods are effective in achieving compliance. If one facility is inaccessible, for example, a school can achieve compliance with the ADA by moving its services, programs, or activities to another facility that is accessible. *Parker v. Universidad De Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000). Title II's emphasis on "program accessibility" rather than "facilities accessibility" was intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access available. *Id. See also*: *Matthews v. Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998); *Schonfeld v. City of Arlsbab*, 978 F. Supp. 1329 (S.D. Cal. 1997). If a public entity has already achieved the "program accessibility" needed for Title II compliance, there is no further need to alter existing buildings.

Should a public entity seek to engage in new construction or alter an existing facility, then a different standard for compliance is applied. Newly constructed facilities (those built after Jan. 26, 1992), or parts of facilities, must be designed and constructed in a manner such that the facility or part of the facility is "readily accessible" to individuals with disabilities. 28 C.F.R. § 35.151(a). Each facility or part of a facility that is altered in a manner that affects or could affect the usability of the facility must, "to the maximum extent feasible", be made accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.151(b). Alteration and construction should be in

conformance with the Uniform Federal Accessibility Standards (UFAS) (41 C.F.R. § 10 I-19.6, Appendix A) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADA) (28 C.F.R. Part 36, App. A). Design, construction, or alteration of facilities in conformance with Appendix A to 28 C.F.R. Part 36 allows for the facility to be deemed to comply with the requirements of 28 C.F.R. Part 35. In any event, however, a departure from either the UFAS or ADA standards is allowed when it is "clearly evident that equivalent access to the facility or part of the facility" is provided. 28 C.F.R. § 35.151(c).

In the present case, Respondents were obligated to make their services, programs and activities, when viewed in their entirety, readily accessible to and usable by handicapped individuals. The Respondents were not required to make each of its existing facilities fully accessible to and usable by handicapped individuals. So long as individuals suffering from disabilities and handicaps have access to the Respondents' services, programs and activities, the Respondents satisfied its ADA obligations.

Based upon the foregoing, it is respectfully submitted that the trial court properly found that whether Petitioner had access to the services offered by the Respondents was a factual issue for the jury. The jury ultimately concluded that the Respondents satisfied their obligations under Title II of the ADA.

The jury decision is supported by the weight of the evidence presented at trial.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that there are no questions of general public importance raised by this matter; that the rulings in this matter do not conflict with other decisions of this or any other court; and that the interests of justice do not require that this Court review this matter. Respondents respectfully request that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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